DATIN PADUKA NUR HAYATI MOHAMED v. JANAVISTA SDN BHD (IN LIQUIDATION)

HIGH COURT MALAYA, KUALA LUMPUR
MOHD FIRUZ JAFFRIL JC
[CIVIL APPEAL NO: 12BNCVC-45-06-2015]
13 DECEMBER 2016

CONTRACT: *Agreement – Sale and purchase agreement – Failure to deliver vacant possession – Claim for payment of balance of purchase price – Whether sale and purchase agreement terminated due to failure to deliver vacant possession – Order of High Court for appellant to pay respondent balance purchase price after delivery of vacant possession of property and memorandum of title – Application for order to specify time for parties to comply with terms of High Court order – Appellant seeking to revise time frame of order at late stage – Whether there was undue delay – Rules of Court 2012, O. 45 r. 6(1)*

The appellant and the respondent entered into a sale and purchase agreement ('SPA') for the purchase of a property. The appellant paid 80% of the purchase price and the balance was payable to the respondent subject to the terms and conditions of the SPA. Under the SPA, vacant possession of the property was to be delivered to the appellant on 27 September 2007. However, the respondent failed to do so. Pursuant to a court order, the respondent was wound up. In 2014, the respondent's liquidator demanded the balance of purchase price from the appellant failing which the SPA would be terminated. The appellant commenced an action at the Sessions Court claiming, *inter alia*, specific performance of the SPA, liquidated and ascertained damages ('LAD') and the right to set-off the balance purchase price from the LAD due and owing by the respondent to the appellant pursuant to the terms of the SPA. The respondent counterclaimed for the payment of the balance purchase price. The Sessions Court Judge ('the SCJ') dismissed the appellant's claim and allowed the respondent's counterclaim. The appellant was ordered to pay the balance of purchase price within 14 days from the date of judgment failing which the respondent had the right to terminate the SPA ('the SC judgment'). The SCJ stayed the execution of the SC judgment on the condition that the appellant's solicitors hold the balance purchase price together with interest and costs as stakeholders pending the disposal of the appeal in the High Court ('the SC stay order'). The High Court dismissed the appeal but ordered that the appellant pay the respondent the balance purchase price after vacant possession of the property and the memorandum of title ('the MOT') is delivered by the respondent to the appellant within 30 days of the court order ('the HC order'). The appellant lodged an appeal against the decision of the High Court but the appeal was

dismissed by the Court of Appeal. The appellant forwarded two copies of the MOT to the respondent for execution and requested for additional documents to be provided by the respondent to effect the transfer in accordance with the terms of the HC order. The respondent returned the said copies of the MOT unexecuted and maintained that the SPA has been terminated. The present application was an order pursuant to O. 45 r. 6(1) of the Rules of Court 2012 ('the ROC') for the court to specify the time for both the appellant and the respondent to comply with the terms of the HC order. The appellant submitted that the HC order only provides for a general time frame for the order to be complied with *ie* the 30 days and that there was no specific time frame for each party to carry out its part of the order.

Held (dismissing application with costs):

(1) The High Court had ordered for the appellant to pay the balance purchase price after vacant possession of the property and the MOT for the property be handed over by the respondent to the applicant within 30 days from the date of the order. Aware of this fact, the respondent wrote to the appellant for purposes of complying with the order. However, the appellant did not respond to the respondent's letter. This prompted the respondent to terminate the SPA for failure of the appellant to pay the balance purchase price within the time stipulated in the order. The appellant refuted the purported termination. The respondent was ready and willing to complete the SPA and deliver vacant possession and title to the appellant but the appellant was not prepared to pay the balance purchase price. When the appellant ran to court and obtained an interim stay of execution of the said order, the 30-day period stipulated by the HC order had expired. (para 27)

(2) Even if the appellant did not agree with the respondent that it was the appellant who was supposed to prepare the MOT, the appellant should have replied stating that it was the respondent who was to prepare the MOT and not the appellant. The appellant could have insisted for the MOT and the keys to the property be forwarded to the appellant first, subject to an undertaking that the appellant will forward the balance purchase price to the respondent after that. Yet the appellant did none of the above. There was undue delay for the appellant to only come to court seeking to revise the time frame of the said order at this late stage and it was unconscionable. (para 27)

(3) The stay orders were not retrospective in effect. Neither could the said orders be said to have been suspended or varied the rights of the parties under the SPA which included the right of the vendor to terminate the SPA due to the failure of the purchaser to make payment in accordance with the SPA. The courts could not rewrite the contracts freely entered into by the parties. (para 27)

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Liong Seow Keng & Ors v. Ho Soon Cheng [2016] 6 CLJ 761 HC ***(refd)***

Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim [2015] 2 CLJ 1037 FC ***(refd)***

The Pacific Bank v. Chan Peng Leong [1998] 2 CLJ 440 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2), Schedule para 16

Rules of Court 2012, O. 45 r. 6(1)

For the appellant - Peter Douglas Ling, Emila Van Buerle & Leong Phing Ai; M/s Peter Ling & Co

For the respondent - Venkatachalam Arunachalam; M/s Ven & Assocs

Reported by Najib Tamby

JUDGMENT

Mohd Firuz Jaffril JC:

[1] The present application before me is for an order pursuant to O. 45 r. 6(1) of the Rules of Court 2012 for this court to specify the time for both the appellant and respondent to comply with the terms of the High Court order issued by Justice Siti Khadijah S. Hassan Bajenid on 4 September 2015.

Background Of The Appellant's Application

[2] The appellant and the respondent entered into a sale and purchase agreement on 27 September 2005 ("SPA") for the purchase of a property.

[3] The appellant paid 80% of the purchase price amounting to RM553,589.60 leaving a balance of RM138,397.40 payable to the respondent subject to the terms and conditions of SPA.

[4] Under the SPA, vacant possession of the property was to be delivered to the appellant on 27 September 2007. However, the respondent failed to do so. Pursuant to a court order dated 26 August 2013, the respondent was wound up.

[5] In 2014, the respondent's liquidator issued a letter of demand to the appellant claiming the balance of purchase price failing which the SPA will be terminated.

[6] This prompted the appellant to file a suit in the Sessions Court claiming, *inter alia*, specific performance of the SPA, LAD and the right to set-off the balance purchase price from the LAD due and owing by respondent to the appellant pursuant to the terms of the SPA.

[7] The respondent, counterclaimed *inter alia*, for the payment of the balance purchase price of RM138,397.40.

[8] On 29 May 2015, the Sessions Court Judge dismissed the appellant's claim and allowed the respondent's counterclaim and ordered, *inter alia*, that the appellant pay the balance of purchase price within 14 days from the date of judgment failing which the respondent had the right to terminate the SPA ("the Sessions Court judgment").

[9] The appellant appealed to this Honourable Court against the decision of the Sessions Court Judge.

[10] On 4 June 2015, the Sessions Court Judge granted an interim stay pending the hearing of appellant's formal application for stay.

[11] Subsequently, on 1 July 2015, the Sessions Court Judge stayed the execution of the Sessions Court judgment on the condition that the appellant's solicitors, Messrs. Peter Ling & Co., hold the balance purchase price together with interest and costs amounting to RM157,920.76 as stakeholders pending the disposal of the appeal in this Honourable Court ("Sessions Court stay order").

[12] On 4 September 2015, this Honourable Court dismissed the appeal but ordered that the appellant pay the respondent the balance purchase price after vacant possession of the property and the memorandum of title ("MOT") is delivered by the respondent to the appellant within 30 days of the said court order ("the High Court order"). The High Court order reads as follows:

> … ADALAH PADA HARI INI DIPERINTAHKAN bahawa Rayuan Perayu ditolak tanpa perintah mengenai kos DAN ADALAH JUGA DIPERINTAHKAN bahawa pembayaran baki harga belian sebanyak RM138,397.40 oleh Perayu hendaklah dibuat selepas milikan kosong Hartanah yang dikenali sebagai Lot 18/PT No. 7276, yang dipegang di bawah Lot No. 5685 GM4307 Mukim Kuala Lumpur, Daerah Kuala Lumpur serta Memorandum Pindahmilik hakmilik Hartanah tersebut diserahkan oleh Responden kepada Perayu dalam 30 hari dari tarikh Perintah di dalam ini.

[13] On 28 September 2015, the respondent's solicitors wrote to the appellant's solicitors on 28 September 2015 for purposes of complying with the High Court order.

[14] On 2 October 2015, the appellant lodged an appeal against the decision of this Honourable Court.

[15] On 13 October 2015, the respondent's solicitors at that time, Messrs. S. Mathews & Associates, ("respondent's former solicitors"), issued a notice to the appellant's solicitors purportedly terminating the SPA on the basis that the appellant had not paid the balance purchase price to the respondent. The appellant disputed the termination by way of a letter dated 16 October 2015.

[16] On 29 October 2015, this Honourable Court granted an interim stay pending the hearing of the appellant's formal application for stay at the High Court. An unconditional stay of the High Court order was granted on 24 November 2015, pending the disposal of the appeal in the Court of Appeal ("the High Court stay order").

[17] On 20 April 2016, the Court of Appeal struck out the appellant's appeal on the ground that leave was not obtained by the appellant.

[18] On 1 June 2016, the appellant's solicitors forwarded two (2) copies of the MOT to the respondent's former solicitors for execution and requested for additional documents to be provided by the respondent to effect the transfer in accordance with the terms of the High Court order.

[19] The respondent's former solicitors returned the said two copies of the MOT unexecuted and maintained that the SPA had been terminated.

Summary Of Appellant's Submissions

[20] In essence, the appellant submitted as follows:

(a) That the appellant's application is within the court's jurisdiction;

(b) That there is no termination of the SPA as it was the respondent's duty to deliver vacant possession of the property and the MOT to the appellant first before the appellant could make payment. Until and unless the respondent delivered vacant possession, the respondent was not in a position to demand the balance of the purchase price;

(c) The SPA cannot be terminated as the appellant is the innocent party in the SPA and had paid 80% of the purchase price whilst the balance 20% has been deposited with the appellant's solicitors as stakeholders pending the respondent's compliance with the High Court order (reliance placed on the Federal Court decision in *Berjaya Times Square Sdn Bhd v. M Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597);

(d) The issue of the purported termination of the SPA was already dealt with by court during the appellant's application for a stay of execution of the order; and

(e) That the respondent's conduct is unconscionable and it was wrong to allow them to take advantage of their own breach.

Summary Of Respondent's Submissions

[21] In brief, the respondent submitted as follows:

(a) That the stay order obtained by the appellant had no effect insofar as the termination of the SPA is concerned;

A (b) The High Court hearing the stay application did not determine on the issue as to whether the respondent's termination of the SPA was void or in breach of the High Court order; and

(c) The application by the appellant is an abuse of process and/or *mala fide* as the appellant only sought to comply with the terms of the High Court
B order after her appeal against the order was struck off by the Court of Appeal.

Principles Applicable

[22] Order 45 r. 6(1) of the Rules of Court 2012 states as follows:

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> Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which act is to be done, the Court shall, without prejudice to Order 3, rule 5, have power to make an order requiring the act to be done within another time being such time after service of that order, or such other time as may be specified therein.

D **[23]** A reading of the above provision clearly shows that the court is empowered to extend time for doing an act required by a judgment or order as prayed for by the appellant.

[24] I also have no reason to disagree with the decision of Nantha Balan J in *Liong Seow Keng & Ors v. Ho Soon Cheng* [2016] 6 CLJ 761 relied upon
E by the appellant wherein it was held that under O. 45 r. 6 of the Rules of Court 2012, s. 25(2) and para. 16 of the Schedule to the Courts of Judicature Act 1964 and/or inherent jurisdiction of the court compels the respondent to comply with the earlier court order.

F **[25]** *Albeit* the court has such powers to grant the order prayed for by the appellant, the court still has to examine the factual matrix of the case in order to determine as to whether the appellant is entitled to such order.

Court's Findings

G **[26]** Having reviewed the cause papers and submissions by both parties, I am of the view that the facts herein do not support the appellant's application.

[27] My reasons are as follows:

(i) I find that the appellant's submission that the High Court order dated
H 4 September 2015 only provides for a general time frame for the order to be complied with ie, the 30 days and that there is no specific time frame for each party to carry out its part of the order (see para. 30 of the appellant's submission dated 19 September 2016) rather misguided.

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(ii) My reading of the said order shows that the court had ordered for the appellant to pay the balance purchase price of RM138,397.40 after vacant possession of the property and the memorandum of transfer for the property be handed over by the respondent to the appellant within 30 days from the date of the order which fell on 4 October 2015.

(iii) Being aware of this fact, the respondent's solicitors wrote to the appellant's solicitors on 28 September 2015 for purposes of complying with the order, the contents of the letter is reproduced below:

Your ref : PDL.KL.1290
Our ref : SMA/JC/L/1287/Janavista
Date : 28th September 2015

Peter Ling & Co.
B-3A-01, Gateway Corporate Suites
Gateway Kiaramas
No. 1, Jalan Desa Kiara
Mont Kiara 50480 Kuala Lumpur By Fax: 03-6211 5268/Post

Dear Sirs,

Re: Kuala Lumpur High Court Civil Appeal No.
Datin Paduka Nur Hayati Binti Mohamed ... Appellant
Janavista Sdn. Bhd. (In Liquidation) ... Respondent
(Sessions Court Summons No. B52NCVC-393-12/2014)

1. We refer to the above and to your letter dated 28.9.2015 enclosing the draft order dated 4.9.2015.

2. Prior to approving the same, we write to seek your confirmation on the following:

2.1 Whether the sum of RM138,397.40 remains held by your firm as stakeholder to be released to our client in accordance with the said order/sale and purchase agreement;

2.2 Whether you have been appointed by the plaintiff to prepare the memorandum of transfer and if so, kindly forward the same to us for our client's execution immediately;

2.3 For the convenience of all the parties, kindly let us know of a suitable date and time the keys and the executed memorandum of transfer can be mutually exchanged with the payment for the balance purchase price prior to 4.10.2015 as required by the said order.

3. Kindly revert to allow us to proceed with the necessary actions.

4. In the interim, kindly take note that our client shall not be responsible for any delay to the completion of the said Order/ sale and purchase agreement and all their rights thereunder are duly reserved.

A Yours faithfully,

Jason Chan
S. Mathews & Associates

c.c.: Client

B (iv) The appellant however did not respond to the above letter. This prompted the respondent to terminate the SPA by way of notice of termination dated 13 October 2015 for failure of the appellant to pay the balance purchase price (within the time stipulated in the order). The appellant's solicitors refuted this purported termination by way of a letter dated 16 October 2015. Based on the letters exchanged between the respective solicitors before me, the respondent was ready and willing to complete the SPA and deliver vacant possession and title to the appellant. The appellant, unfortunately, was not prepared to pay the balance purchase price.

D (v) The appellant then ran to court and obtained an interim stay of execution of the said order on 29 October 2015 and thereafter an unconditional stay on 24 November 2015. It is to be noted that, by then, the 30 day period stipulated by the High Court order had expired on 4 October 2015.

E (vi) Only after the appellant's appeal was struck off by the Court of Appeal on 20 April 2016 did the appellant seek to revive the SPA based on the 30-day time frame stated in the High Court order. This was refused by the respondent as the SPA had been terminated on 13 October 2015.

F (vii) It is my view that even if the appellant did not agree with the respondent's letter stating that it was the appellant who was supposed to prepare the memorandum of transfer (MOT), the appellant should have replied stating that it was the respondent who is to prepare the MOT and not the appellant. The appellant could have also insisted for the MOT and the keys to the property be forwarded to the appellant first, subject to an undertaking that the appellant will thereafter forward the balance of the purchase price to the respondent. Yet the appellant did none of the above. The appellant only complained about the respondent's proposal to exchange the MOT and the keys to the property in exchange for the balance purchase price *via* the letter dated 28 September 2015 to this court after the appeal was struck off. Regretfully, there is undue delay for the appellant to only come to court seeking to revise the time frame of the said order at this late stage and it is unconscionable.

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(viii) Furthermore, I note that the stay order on 29 October 2015 and 24 November 2015 were not retrospective in effect. Neither can the said orders be said to have suspended or varied the rights of the parties under the SPA, which included the right of the vendor to terminate the SPA due to the failure of the purchaser to make payment in accordance with the SPA. In this regard, it is trite that the courts do not rewrite the contracts freely entered into by the parties.

Conclusion

[28] I am of the view that the order sought by the appellant is not one which I can grant as of right as the turn of events has superseded the appellant's application. To allow such would mean that I am turning back the wheel of time by ordering for the stay order to take effect retrospectively prior to the termination of the SPA by the respondent, and also in one broad stroke, to overreach and rule that the termination of the SPA by the respondent was unlawful. I am not convinced that I can grant such consequential orders at this stage.

[29] Indeed, the appellant should have filed an application for a stay of the order dated 4 September 2015 prior to the expiry of the 30 day period and the subsequent termination of the SPA by the respondent, not after. The fact that a stay order was granted pending disposal of the appellant's appeal to the Court of Appeal was only to maintain the *status quo* of the transaction, which already stood as terminated as of the date the stay order was granted, without stating that the termination of the SPA was null, void, or ineffective. Hence, it did not mean that the High Court in granting the stay order was of the view that the termination by the respondent was invalid or void *ab initio*. To suggest such would mean that a decision in an interlocutory application is final and binding whereas the correct legal position is the opposite as a finding in an interlocutory application cannot be said to be one which finally determines issues between parties (see *Syarikat Kemajuan Timbermine Sdn Bhd v. Kerajaan Negeri Kelantan Darul Naim* [2015] 2 CLJ 1037; [2015] 3 MLJ 609 where the Federal Court held as follows:

(3) The limitation issue was not at any stage abandoned by the respondent. The issue was raised and kept alive in the High Court and was argued by both sides in the Court of Appeal. The plea of *res judicata* with regard to the issue of limitation also failed. The registrar's decision in the interlocutory application was not finally determinative of the limitation issue and it was open to the High Court at full trial to review the issue based on the oral and documentary evidence presented …

[30] Insofar as the termination of the SPA is concerned, it must be an issue determined with precision in order to be binding. As in the case of every application for a stay of execution or proceedings, the issue for determination is whether there were special circumstances warranting a stay to be granted or not (see Federal Court decision in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2003] 5 AMR 758).

[31] In absence of any written grounds of decision on the granting of the stay application, I am not prepared nor am I in a position to accept the appellant's submission that the court hearing the stay application had determined the issue of the termination of the SPA by the respondent to be invalid when the stay order itself did not say so (see *The Pacific Bank Bhd v. Chan Peng Leong* [1998] 2 CLJ 440; [1998] 2 MLJ 613).

[32] Insofar as to whether the act of the respondent in terminating the SPA is valid or otherwise, this is not an issue which is to be determined at this forum as none was sought by the appellant in their notice of application.

[33] Accordingly, the appellant's application is hereby dismissed with cost.